No. 89-6332 (8)

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT S. MINNICK, PETITIONER

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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28 pp

QUESTION PRESENTED

Whether law enforcement officers may reinitiate custodial interrogation after a suspect has invoked his right to counsel and consulted with a lawyer.

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INTEREST OF THE UNITED STATES

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court held that a suspect who invokes his right to counsel during custodial interrogation "is not subject to further interrogation by the authorities until counsel has been made available to him," unless the suspect initiates further conversation. *Id.* at 484-485. This case presents the question whether the rule of *Edwards* should extend to cases in which a suspect has invoked his right to counsel, the interrogation has ceased, and the suspect has been afforded an opportunity to consult with counsel. The Court's resolution of this question will affect the conduct of in-

terrogations by federal law enforcement officers and the admission of voluntary statements by defendants in federal criminal prosecutions.[1] In addition, the Court's disposition of this case will affect the admissibility in federal prosecutions of statements obtained by state and local law enforcement officers in circumstances similar to those in this case.

STATEMENT

1. On April 25, 1986, petitioner and another man, James Dyess, escaped from the Clarke County, Mississippi jail. The day after their escape, petitioner and Dyess came upon a mobile home, which they entered in search of guns. Donald Thomas, the owner of the mobile home, drove up in a pickup truck while

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[1] The Federal Bureau of Investigation permits its agents to reinitiate interrogation after a suspect has invoked the right to counsel and has had an opportunity to consult with a lawyer. The FBI's *Legal Handbook for Special Agents* states:

> [I]f an accused invokes his/her right to counsel during the first effort at interview, Agents should not attempt a second interview until the accused has had an opportunity to consult with counsel or the accused "initiates" a second interview. This rule does not prevent Agents from recontacting an accused for the limited purpose of determining if he/she has had an opportunity to consult with counsel. If the accused states he/she has not had such opportunity, the recontact must be terminated. If, however, the accused states he/she has been afforded the opportunity but decided not to exercise this right, or he/she has in fact contacted counsel, Agents can engage in a second interview if, after again being advised of his/her *Miranda* rights, the accused agrees to waive these rights and speak with the Agents.

FBI, *Legal Handbook for Special Agents* § 7-4.1(5), at 84 (1990).

petitioner and Dyess were in the process of collecting guns and ammunition. Thomas was accompanied by Lamar Lafferty and Lafferty's two-year-old son. Dyess emerged from the trailer and shot Thomas in the back with a shotgun and in the head with a pistol. According to petitioner's confession, Dyess then ordered petitioner to shoot Lafferty with the pistol. Petitioner claimed that Dyess pointed the shotgun at him and forced him to shoot and kill Lafferty. J.A. 61-62, 70-73.

Thomas's younger sister Marty and her friend Desiree Beech drove up to the trailer shortly after the murders. Petitioner met the girls with a pistol and ordered them to get out of the car if they wanted to live. Marty Thomas recognized Lafferty's body lying on the ground outside the trailer. Petitioner and Dyess marched the girls into the trailer and tied their hands and feet with haystring. Dyess then dragged the bodies of the murder victims to a nearby gully, and the two men escaped in Thomas's pickup truck. J.A. 63, 70-71.

2. Warrants for petitioner's arrest on murder charges were issued by a Mississippi state court on May 6, 1986. J.A. 7, 26. On August 22, 1986, petitioner was arrested in San Diego County, California. The following day, agents of the Federal Bureau of Investigation interrogated petitioner at the San Diego County jail. The agents read petitioner the *Miranda* warnings, and petitioner indicated that he was willing to answer some questions, although he declined to sign a waiver form. J.A. 13-14, 74. During the interview, petitioner admitted that he had escaped with Dyess, that he and Dyess "got on the road" and "came to the trailer," and that Dyess believed they would find guns in the trailer that would be their "ticket out of town." J.A. 15. Petitioner

told the FBI agents that "[i]t was my life or theirs," and he said that Dyess had beaten him "a couple of days or a week after 'the mobile home.'" J.A. 14. The FBI agents commented that it appeared petitioner may have spared the lives of the two girls, to which petitioner responded that Dyess "wanted to kill them to[o]." J.A. 15. When petitioner hesitated to tell the agents exactly what had happened at the mobile home, they reminded him that he did not have to answer questions without a lawyer. Petitioner then told the agents to "[c]ome back Monday when I have a lawyer," and stated that he would make a more complete statement with his lawyer present. J.A. 16. The interrogation ceased immediately, and petitioner was provided with an attorney, with whom he consulted two or three times over the weekend. The attorney advised petitioner not to speak to anyone else about the incident at the mobile home. J.A. 14-16, 44-47, 73-75.

On Monday, August 25, after petitioner had consulted with his lawyer, Clarke County Deputy Sheriff J.C. Denham questioned petitioner at the San Diego County jail. Denham first advised petitioner of his *Miranda* rights, and petitioner again refused to sign a waiver form. The deputy asked petitioner whether he wanted to talk about what had happened. Petitioner replied, "It's been a long time since I've seen you." After conversing with Denham about relatives and friends in Mississippi, petitioner agreed to talk about his escape from the Clarke County jail. He proceeded to confess his involvement in the murders, although he said that he had killed only one of the two men, and then only because Dyess had forced him to do so. Petitioner refused to sign the deputy's handwritten notes of the interview. J.A. 73-75.

3. Petitioner waived extradition and was returned to Mississippi, where he was indicted in September 1986 on two counts of capital murder. In the trial court, he moved to suppress his confession, claiming that his statements were not voluntary and had been elicited in violation of his rights under the Fifth and Sixth Amendments. The trial court denied petitioner's motion, although it refused to allow the prosecution to introduce the deputy's notes of the interview. Petitioner was convicted of murdering Thomas and Lafferty and was sentenced to death. J.A. 19-20, 67, 69, 73-75.

4. The Mississippi Supreme Court affirmed petitioner's conviction and sentence. J.A. 69-117. The court upheld the admission of the statements petitioner made to Deputy Sheriff Denham. First, the court held that Denham's interrogation did not violate the principles of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Under *Edwards*, a suspect who requests an attorney is not subject to further police-initiated interrogation "until counsel has been made available to him." J.A. 75 (quoting *Edwards*, 451 U.S. at 405). After the suspect has had an opportunity to consult with counsel, the court held, "the *Edwards* bright-line rule as to initiation does not apply," and interrogation may resume. J.A. 75-76.

The Mississippi Supreme Court also rejected petitioner's argument that Denham's interrogation violated petitioner's right to counsel under Mississippi law.[2] J.A. 76. The court concluded that petitioner "had been advised by an attorney prior to the con-

[2] As discussed below, see pp. 21-22, *infra*, the Mississippi Supreme Court has held, as a matter of state law, that the right to counsel under the Mississippi Constitution attaches when a suspect is arrested pursuant to a warrant.

versation with Denham, was aware that he did not have to make any statements or answer any questions, and * * * made a conscious decision to relinquish his Sixth Amendment right to counsel." J.A. 80.

Justice Robertson dissented. J.A. 112-117. He observed that Rule 4.2 of the Mississippi Rules of Professional Conduct prohibits lawyers from communicating directly with parties known to be represented by counsel, and found "no basis for assuming that a prosecuting attorney is exempt from [this rule]." J.A. 113. Accordingly, Justice Robertson concluded that, once a suspect's right to counsel under Mississippi law has attached, he may not be questioned except through counsel. J.A. 117.

SUMMARY OF ARGUMENT

1. The rule of *Edwards* should not be extended to prohibit law enforcement officers from reinitiating questioning when, after a suspect has invoked his right to counsel, he has been afforded an opportunity to consult with counsel and has done so. The prophylactic rules of *Edwards* and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are designed to counteract the psychological pressures of custodial interrogation. The Court, however, has declined to "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975). Applying the rule of *Edwards* in the circumstances of this case is unjustified because the potentially coercive pressures of custodial interrogation are dissipated when the interrogation is broken off and the suspect is given an opportunity to confer with counsel.

Petitioner's invocation of the right to counsel demonstrated that he was capable of choosing between

speech and silence even before he conferred with a lawyer. And the fact that petitioner's request for counsel was honored gave him no reason to doubt that a second invocation of his rights would be honored. The risk of police badgering or overreaching that concerned the court in *Edwards* is therefore not sufficiently serious in this setting to justify imposing on society the high cost of excluding probative, voluntary confessions.

2. Petitioner did not present a Sixth Amendment question in his petition for certiorari. The Court should therefore decline to consider his Sixth Amendment argument. In any event, petitioner's Sixth Amendment rights had not attached at the time of his confession, since he had not been formally charged or even arraigned on the arrest warrant. Petitioner's contention that his Sixth Amendment right to counsel attached when the arrest warrant was issued is not supported by prior decisions of this Court or the Mississippi Supreme Court. Federal law, not state law, determines the moment at which federal constitutional rights attach. Mississippi has determined only that the right to counsel under a parallel provision of the Mississippi Constitution attaches when an arrest warrant is issued, a point that is irrelevant to analysis of the federal Sixth Amendment question.

ARGUMENT

I. THE *EDWARDS* RULE SHOULD NOT BE EXTENDED TO INTERROGATIONS CONDUCTED AFTER A SUSPECT HAS CONSULTED WITH A LAWYER

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. To counteract those pressures, the Court devised prophylactic rules intended to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469.

Fifteen years later, in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court adopted an additional prophylactic rule for cases in which the accused invokes the right to counsel after *Miranda* warnings have been given. The Court held that, following such a request, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

The question in this case is whether the rule of *Edwards* should be extended to prohibit law enforcement officials from questioning a suspect whose prior invocation of the right to counsel has been honored by breaking off the interrogation and affording the suspect an opportunity to consult with a lawyer. Neither *Edwards* nor subsequent decisions of this Court applying the *Edwards* rule have resolved that question, because the suspects in those cases were not permitted to consult with counsel before the police

reinitiated questioning.[5] We submit that *Edwards* should not apply in this setting. Because the risk that a suspect will capitulate to police coercion is greatly reduced when questioning is broken off and the suspect is afforded an opportunity to consult with an attorney, any benefit that might be obtained by applying the prophylactic rule of *Edwards* in this context does not outweigh the costs associated with the suppression of voluntary and highly probative confessions.

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[5] See *Arizona* v. *Roberson*, 486 U.S. 675, 678 (1988); *Connecticut* v. *Barrett*, 479 U.S. 523, 525-527 (1987); *Shea* v. *Louisiana*, 420 U.S. 51, 52 (1985); *Smith* v. *Illinois*, 469 U.S. 91, 92-94 (1984); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1041-1042 (1983); *Wyrick* v. *Fields*, 459 U.S. 42, 43-45 (1982). In *Solem* v. *Stumes*, 465 U.S. 638, 642 (1984), the suspect spoke to an attorney over the telephone after he was taken into custody, and he subsequently invoked his right to counsel. Despite the suspect's invocation of his rights, the police twice reinitiated interrogation without permitting further consultation with the lawyer. *Id.* at 639-641. The Court assumed, for purposes of deciding whether *Edwards* would be applied retroactively, that the renewed interrogation violated *Edwards*. 465 U.S. at 642.

Petitioner argues that the decision of the Mississippi Supreme Court is inconsistent with language in this Court's opinions. Pet. Br. 12-13, 15-18. But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *CBS, Inc.* v. *FCC*, 453 U.S. 367, 385 (1981) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979)). It is true that some of this Court's formulations of the *Edwards* rule would seem to be broad enough to prohibit the renewed questioning in this case, but other formulations—such as the statement in *Edwards* itself that counsel must be "made available" to the accused—would seem to permit the questioning here. Consequently, the question whether the rule of *Edwards* should be extended to a new class of cases should be decided on its merits rather than on the basis of language in prior opinions presenting different facts.

1. The *Edwards* rule, like other aspects of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). Because compulsion is an essential element of a Fifth Amendment violation, see *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966); *Illinois* v. *Perkins*, 110 S. Ct. 2394, 2397-2398 (1990), the prophylactic rule of *Edwards* must be based on the risk of coercion. The Court has said that the justification for the *Edwards* rule is the risk that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984); see also *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion).

Where the suspect invokes his right to counsel and the authorities immediately break off the interrogation and afford the suspect an opportunity to consult with counsel, the risk of coercion is greatly reduced. In that setting, in contrast to the *Edwards* setting in which the suspect is never given a lawyer, it is far less likely that law enforcement officers will wear down the accused and induce him to confess. There is therefore no need to extend the *Edwards* per se rule of exclusion to the setting of this case by presuming conclusively that reinitiation of questioning, even after the suspect has consulted a lawyer, will overcome the will of the suspect and compel him to speak when he would otherwise remain silent.

After consulting with a lawyer, the accused is in a far better position to exert control over the course of the questioning. He has had the benefit of his lawyer's advice, and he understands that he is not required to face interrogation alone. Because the suspect's initial request for counsel was honored, he has no reason to doubt that police will honor a request to discontinue the renewed questioning. Cf. *Arizona* v. *Roberson*, 486 U.S. at 686 n.6 (doubt may be raised by failure to provide suspect with requested counsel). Moreover, the break in questioning itself dissipates the psychological pressures of interrogation. It does not violate the suspect's "right to cut off questioning," *Miranda*, 384 U.S. at 474, for the police to inquire, after the suspect has consulted with counsel, whether he is now prepared to speak with them.[4]

In sum, the opportunity to consult with counsel relieves the "pressures of custodial interrogation" that gave rise to the per se rule of *Edwards*. The Court therefore should not extend the *Edwards* rule to a suspect who has invoked his right to counsel and has had an opportunity to consult with a lawyer.[5]

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[4] In this case, petitioner actually consulted with a lawyer on several occasions before Deputy Sheriff Denham questioned him on August 25, 1986. The analysis would not be significantly different if he had been offered counsel but had declined the opportunity to consult with counsel before his reinterrogation.

[5] The rule applied by the Mississippi Supreme Court in this case, like the rule of *Edwards* itself, is a bright-line rule that fully "serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Roberson*, 486 U.S. at 682. There is nothing vague or ambiguous about the requirement that law enforcement officers not reinitiate interrogation of a suspect in custody who invokes the right to

The right to counsel during questioning and the right to terminate questioning were the two principal safeguards created by the Court in *Miranda* to protect the constitutional privilege against compelled self-incrimination during custodial interrogation. Accordingly, once the State has provided the suspect access to counsel, the suspect is in the same legal position as any other suspect who has previously chosen to invoke his right to silence and cut off questioning. As long as the police do not persist in "repeated efforts to wear down [the suspect's] resistance and make him change his mind," *Michigan* v. *Mosley*, 423 U.S. 96, 105-106 (1975), they should be allowed to approach the suspect to determine whether, after speaking with counsel, he wishes to submit to police questioning.

2. Because *Miranda* and *Edwards* establish prophylactic rules, and thus may result in the exclusion of some voluntary confessions, the Court has been careful to weigh the benefits of those rules against their costs each time it has determined whether to apply them to a new class of cases. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298, 306-307, 309 (1985) (*Miranda* "sweeps more broadly than the Fifth Amendment itself"); *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974); see also *New York* v. *Quarles*, 467 U.S. 649, 657 (1984); *Duckworth* v. *Eagan*, 109 S. Ct. 2875, 2883 (1989) (O'Connor, J., concurring).

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counsel "until counsel has been made available to him." *Edwards*, 451 U.S. at 484-485. Thus, there is no reason to prefer the rule of *Edwards* to the rule applied by the Mississippi Supreme Court on the basis of clarity or ease of application.

In the *Edwards* setting, the Court found the per se rule justified because the Court considered it highly unlikely that a person who had invoked his right to counsel would validly waive that right when the police again approached him without respecting his request for counsel. The few cases in which a valid waiver might be found in that setting were not worth the litigation costs and the chance of an erroneous finding of waiver. Moreover, the per se *Edwards* rule had the benefit of discouraging a police practice that the Court regarded as having a high risk of abuse and little justification.

The benefits of extending the *Edwards* rule to cases such as this one are much more modest. A per se rule would, of course, still enable the courts to avoid having to make case-by-case inquiries into the validity of a suspect's waiver of his rights and would avoid certain litigation errors. But because a suspect is less likely to be subject to coercion after he has consulted with an attorney, there will be many more valid waivers in a case like this one than in the *Edwards* setting. Moreover, the benefit of avoiding litigation errors against the defendant will be counterbalanced by the errors that the per se rule automatically generates by disabling the State from proving that particular waivers were valid. Finally, because the police practice of reinitiating contact with the suspect after he has consulted with counsel carries less risk of abuse than the practice at issue in *Edwards*, there is no justification for creating a rule to discourage the practice altogether.

By contrast, the costs of extending the *Edwards* rule to questioning initiated after a suspect has consulted with counsel would be significant. This Court has recognized that " 'the need for police questioning

as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable' * * *; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986); see also *Oregon* v. *Elstad*, 470 U.S. at 305; *United States* v. *Washington*, 431 U.S. 181, 186, 187 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Confessions, if obtained by fair methods that guarantee their reliability, result in the resolution of many cases that could not otherwise be solved, ensure confidence in the accuracy of criminal judgments, reduce the risk of prosecuting or convicting innocent persons, and alleviate burdens on all segments of the criminal justice system. Any rule that excludes voluntary, reliable confessions from evidence therefore imposes substantial costs and carries a heavy burden of justification.

Petitioner asserts (Pet. Br. 15 n.12) that "[o]ther courts have generally agreed that *Miranda* and *Edwards* forbid any state-initiated interrogation without counsel present once the accused has requested that counsel act as a medium between him and the government." That assertion contrasts sharply with the argument in the petition for certiorari that "[m]any lower courts have differed on the proper interpretation of *Edwards*," Pet. 5, and petitioner's assertion that "the lower courts are in hopeless disarray over this issue." Pet. Reply Br. 5. In fact, the great majority of the cases petitioner cites in his brief on the merits do not stand for petitioner's proposition. Indeed, in many of the cases cited by petitioner, the court held that there was no violation of the Fifth Amendment, because the suspect

did not request counsel,[6] or the police did not initiate the discussion,[7] or the custody was not continuous.[8] Moreover, in most of the cited cases in which the court found a Fifth Amendment violation, the authorities did not break off the interrogation and give the suspect an opportunity to consult with counsel.

Only three of the cases on which petitioner relies applied the *Edwards* rule to the interrogation of a defendant who had invoked the right to counsel and consulted with a lawyer before the resumption of police questioning. See *Roper* v. *State*, 258 Ga. 847, 375 S.E.2d 600, cert. denied, 110 S. Ct. 290 (1989); *State* v. *Newsom*, 414 N.W.2d 354 (Iowa 1987); *Koza* v. *State*, 102 Nev. 181, 718 P.2d 671 (1986).[9]

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[6] See *Terry* v. *LeFevre*, 862 F.2d 409 (2d Cir. 1988); *United States* v. *Weisz*, 718 F.2d 413 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984); *People* v. *Gacho*, 122 Ill. 2d 221, 522 N.E.2d 1146, cert. denied, 109 S. Ct. 264 (1988); *State* v. *Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990); *State* v. *Broom*, 40 Ohio St. 3d 277, 533 N.E.2d 682 (1988), cert. denied, 109 S. Ct. 2089 (1989).

[7] See *Pittman* v. *Black*, 764 F.2d 545 (8th Cir.), cert. denied, 474 U.S. 982 (1985); *Doerner* v. *State*, 500 N.E.2d 1178 (Ind. 1986); *State* v. *Conover*, 312 Md. 33, 537 A.2d 1167 (1988); *State* v. *Morris*, 719 S.W.2d 761 (Mo. 1986) (en banc); *State* v. *Turner*, 136 Wis. 2d 333, 401 N.W.2d 827 (1987).

[8] See *People* v. *Trujillo*, 773 P.2d 1086 (Colo. 1989) (en banc).

[9] In *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117 (7th Cir.), cert. denied, 483 U.S. 1010 (1987), the court held that the suspect had "invoked" his right to counsel, but the suspect in that case did not in fact request counsel, and the court's holding was based only on the suspect's "unqualified acceptance of counsel at his arraignment." 813 F.2d at 123 & n.4.

Other courts presented with that factual situation have reached the same result as the Mississippi Supreme Court in this case. See *United States* v. *Hall*, 905 F.2d 959 (6th Cir. 1990); *United States* v. *Halliday*, 658 F.2d 1103 (6th Cir.), cert. denied, 454 U.S. 1127 (1981); *State* v. *Grizzle*, 293 S.C. 19, 358 S.E.2d 388 (1987), cert. denied, 484 U.S. 1012 (1988); *State* v. *Cody*, 323 N.W.2d 863 (S.D. 1982). Thus, petitioner's suggestion that a consensus has developed in the lower courts is incorrect. Because the balance of costs and benefits argues against a per se rule in this setting, the Court should hold that where a suspect has requested and been given an opportunity to consult with counsel, the admissibility of any statement he subsequently makes to law enforcement officers should be judged by the standards that apply generally to statements made by suspects in the course of custodial interrogation.[10]

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[10] The dissenting justice of the Mississippi Supreme Court concluded that a state ethical rule prohibiting attorneys from contacting represented parties should be applied to preclude questioning of suspects represented by counsel. J.A. 112-117 (Robertson, J., dissenting). Of course, this Court does not determine whether state criminal trials were conducted in accordance with state rules of professional ethics. Such ethical rules are of constitutional significance, if ever, only after the Sixth Amendment right to counsel has attached upon the commencement of formal judicial proceedings against the suspect. See *Patterson* v. *Illinois*, 487 U.S. 285, 302-303 (1988) (Stevens, J., dissenting) (ethical violation "rise[s] to the level of an impairment of the Sixth Amendment right to counsel" when "adversary proceedings commence"). As demonstrated below, petitioner's Sixth Amendment rights had not attached at the time of his confession. Thus, the ethical rule cited by Justice Robertson is irrelevant here.

II. THE INTERROGATION DID NOT VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHTS

Petitioner also argues (Br. 22-31) that the admission of his confession violated the Sixth Amendment.

1. As an initial matter, the petition for certiorari did not present a Sixth Amendment issue, but instead asked the Court to resolve a conflict in the lower courts under the Fifth Amendment. Petitioner framed the question presented as "[w]hether, once an accused has invoked his Fifth Amendment right to counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?" Pet. Reply Br. I. Petitioner asked the Court to grant certiorari to resolve a conflict between the decision in this case and *Roper* v. *State*, 258 Ga. 847, 375 S.E.2d 600, cert. denied, 110 S. Ct. 290 (1989), and stated that "the Georgia Supreme Court reversed the conviction in *Roper* because a confession had been exacted in violation of the Fifth Amendment." Pet. 6. Petitioner also alleged a conflict with the Seventh Circuit's decision in *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, cert. denied, 483 U.S. 1010 (1987), and noted that the Seventh Circuit "expressly rejected Espinoza's Sixth Amendment claim * * * and rested the decision solely on the Fifth Amendment." Pet. 7 n.5. See also Pet. 9 ("Relying on the Fifth Amendment, the court [in *State* v. *Preston*, 555 A.2d 360 (Vt. 1988)] ordered the suppression of [the statement]"); Pet. 9 n.11 (*State* v. *Perkins*, 753 S.W.2d 567 (Mo. App. 1988), "rest[s] * * * solely on the Fifth Amendment"). Indeed, immediately after recapitulating "[t]he question before this Court," the petition stated that "[i]n the context of

the Sixth Amendment right to counsel, this question would obviously not arise." Pet. 11.

In short, the petition sought review of a Fifth Amendment question, not the Sixth Amendment question petitioner now seeks to place before the Court in his brief on the merits. Accordingly, the Court should follow its usual practice and decide only the Fifth Amendment question presented in the petition. See Sup. Ct. R. 24.1(a) ("[T]he brief may not raise additional questions or change the substance of the questions already presented in [the petition for a writ of certiorari]."); see also *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 428-429 (1964).

2. If the Court decides that the Sixth Amendment issue is properly presented for review, it should find that there was no Sixth Amendment violation in this case, because petitioner's Sixth Amendment rights had not attached at the time of his interrogation.

The right to counsel afforded by the Sixth Amendment attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion); see also *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). The initiation of formal judicial proceedings "is the starting point of our whole system of adversary criminal justice," and the point at which the accused is "immersed in the intricacies of substantive and procedural criminal law." *Kirby*, 406 U.S. at 689. The Court's approach is consistent with the "core purpose" of the Sixth Amendment right to counsel, which is to ensure the assistance of counsel at trial and at critical pretrial proceedings in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984).

Petitioner asserts that "this Court looks to the criminal law of the state in question" to "determine when formal criminal proceedings begin." Pet. Br. 23-24 (citing *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977)). If petitioner is contending that state law determines when Sixth Amendment rights attach, he is plainly wrong. The determination whether "the guiding hand of counsel * * * is essential" at a particular point in the prosecution is a matter of federal law. See *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970). Nothing in *Moore* v. *Illinois*, *supra*, suggests that state law determines the point at which, under federal law, the Sixth Amendment right to counsel attaches. Rather, the Court in *Moore* applied the standards enunciated in *Kirby* to make that determination. In *Moore*, the Court concluded that "the government ha[d] committed itself to prosecute," and the defendant was "faced with the prosecutorial forces of organized society," at the preliminary hearing stage. 434 U.S. at 228.

Petitioner is equally off the mark if he is contending that, as a matter of federal law, his Sixth Amendment rights attached at the moment the arrest warrants were issued by a Mississippi court. This Court has "never held that the [Sixth Amendment] right to counsel attaches at the time of arrest." *United States* v. *Gouveia*, 467 U.S. at 190. On the contrary, the Court has held that, where formal charges have not been filed prior to arrest, "the arraignment signals 'the initiation of adversary judicial proceedings.'" *Michigan* v. *Jackson*, 475

U.S. 625, 629 (1986) (citing *Gouveia*, 467 U.S. at 187-188).[11]

There is nothing unique about Mississippi's criminal procedure that would justify holding that the Sixth Amendment right to counsel attaches at the time an arrest warrant is issued or at the time the subject of the warrant is arrested. Because the issuance of an arrest warrant in Mississippi, as elsewhere, is an ex parte proceeding, Miss. Code Ann. § 99-3-21 (1972), there is no role for defense counsel at that stage of the proceedings. Moreover, in Mississippi, as in other jurisdictions, an application for a warrant and an arrest on the warrant do not

[11] Nomenclature in this area can be confusing. In many States, the term "arraignment" refers to an arrestee's first appearance before a judical officer shortly after arrest, at which the judicial officer typically sets the terms of the arrestee's release, advises him of his rights, and may arrange for the appointment of counsel if the arrestee is indigent. In the federal system, and in Mississippi, that proceeding is referred to as the "initial appearance." See Fed. R. Crim. P. 5; Rule 1.04, Miss. Uniform Crim. R. of Cir. Ct. Practice (1979). The "arraignment," in both the federal system and in Mississippi, occurs later, after formal charges are filed; it is the proceeding at which the defendant enters his plea to the charges. See Fed. R. Crim. P. 10; Rule 3.01, Miss. Uniform Crim. R. of Cir. Ct. Practice. A preliminary hearing, in both state and federal systems, is an adversary hearing at which the State seeks to establish to the satisfaction of a judicial officer that it has probable cause to hold the defendant to answer to the charges. See Fed. R. Crim. P. 5.1; Rule 1.07, Miss. Uniform Crim. R. of Cir. Ct. Practice (1979). In the federal system, which generally parallels Mississippi practice, it is settled that the Sixth Amendment right to counsel does not attach at arrest. See *United States* v. *Gouveia, supra; United States* v. *Pace*, 833 F.2d 1307, 1310-1312 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988); *Judd* v. *Vose*, 813 F.2d 494, 496-497 (1st Cir. 1987); *United States* v. *Guido*, 704 F.2d 675, 676 (2d Cir. 1983).

reflect a firm commitment on the part of the State to institute criminal proceedings against the suspect. It is only at the point at which the State files formal charges, or where "the intricacies of substantive and procedural criminal law" come into play, *Kirby*, 406 U.S. at 689, that the Sixth Amendment right to counsel attaches. Accordingly, petitioner's Sixth Amendment right to counsel had not attached at the time of his interview by Deputy Sheriff Denham.[12]

Contrary to petitioner's contention (Pet. Br. 22-24), the Mississippi Supreme Court has not held that federal Sixth Amendment rights attach when an arrest warrant is issued, but instead has expressly based its decisions on a parallel provision of the Mississippi Constitution. In *Page* v. *State*, 495 So. 2d 436, 440 n.5 (1986), the Supreme Court of Mississippi stated that it was "very much aware of the fact that a number of recent cases have held that the right to counsel secured by the Sixth Amendment to the Constitution of the United States is available only after the initiation of judicial criminal proceedings, *i.e.*, indictment and arraignment." In holding that the right to counsel attaches upon arrest, the court expressly "reject[ed] the federal approach" and "rel[ied] exclusively upon state law." *Ibid.* See also *id.* at 439 ("For purposes of our state constitutional right to counsel, we define the advent of the accusatory stage by reference to state law."); *Can-*

[12] Petitioner's argument (Pet. Br. 22-23 n.16) appears to assume that if the Sixth Amendment right to counsel attaches at some time before indictment, it must attach when the arrest warrant is issued. This is an oversimplification, because there are several intermediate stages in the Mississippi process, including the initial appearance and the preliminary hearing. See Rules 1.04 and 1.07, Miss. Uniform Crim. R. of Cir. Ct. Practice (1979).

naday v. *State*, 455 So. 2d 713, 722 (Miss. 1984) ("[W]e base our opinion herein on Mississippi law. * * * Mississippi jurisprudence compels the result.").[13]

The correctness of the Mississippi court's resolution of Mississippi law regarding the right to counsel under that State's Constitution is, of course, not at issue here. Under federal law, petitioner's right to counsel had not attached at the time he made the statements at issue in this case. The Sixth Amendment to the United States Constitution therefore has no role to play in determining the admissibility of those statements at petitioner's trial.

CONCLUSION

The judgment of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted.

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[13] The only other Mississippi precedent cited by petitioner, *Livingston* v. *State*, 519 So. 2d 1218, 1221 (Miss. 1988), expressly relied upon the reasoning of *Cannady* and *Page*. See 519 So. 2d at 1220.

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